No. 91-719

FILED
APR 16 1992
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN - - - - Petitioner

versus

RICKY HAROLD RALEY - - - Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a *Boykin* v. *Alabama*, 395 U.S. 238 (1969), colloquy was given?

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BRIEF FOR PETITIONER

The Attorney General of the Commonwealth of Kentucky as counsel for Al C. Parke, Warden of the Kentucky State Reformatory, requests that the Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit and states as follows:

OPINIONS BELOW[1]

The opinion of the United States Court of Appeals for the Sixth (AP 3-21) is reported as *Raley* v. *Parke*, 945 F.2d 137 (6th Cir. 1991). The opinion of the United States District Court for the Western District of Kentucky is not reported. (AP 21-25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is

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[1]Appendix to Petition for Certiorari is cited as "AP".

not reported (AP 26-33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied respondent's motion to review the opinion of the Kentucky Court of Appeals. (AP 7).

JURISDICTION

The judgment to be reviewed is that of the United States Court of Appeals for the Sixth Circuit decided and filed September 19, 1991. *Raley* v. *Parke,* 945 F.2d 137 (No. 90-5446) (AP 1-3), affirming in part and reversing in part the judgment of the United States District Court for the Western District of Kentucky (Civil Action No. C-89-0756 (L)(A)) (AP 21-25). The jurisdiction of the United States District Court was invoked pursuant to title 28 U.S.C. §2254. (See AP 21). The Court has jurisdiction to review the judgment and opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions are in the appendix to this brief.

STATEMENT OF THE CASE[2]

Respondent was indicted on May 13, 1986, for the felony offenses of second degree robbery and for being a persistent felony offender in the first degree, which are the offenses for which he is presently incarcerated. (AP 27). [The Sixth Circuit opinion erroneously refers to burglary rather than robbery. (AP 4).] On November 11, 1986, respondent filed a motion to dismiss count two of the indictment, which was the persistent felony offender charge. (R. 3; TR 36). [A persistent felony offender conviction operates to enhance the offense for the underlying crime by auto-

matically increasing the minimum and maximum permissible punishment. Ky.Rev.Stat. 532.080. See appendix 4-6 to this brief.] The state court hearing was held on May 28, 1987, and the Kentucky trial court ruled that both convictions sought to be used by the prosecution as evidence were constitutionally valid. (AP 32-33; AP 5-8; TE 60-61.)

The first prior conviction relied upon by the Commonwealth to prove the persistent felony offender status in this case was entered on January 3, 1980, (No. 79-CR-1214) in which Respondent received a sentence of five years on each count of a three-count indictment for burglary offenses. The second prior conviction relied upon by the Commonwealth for the persistent felony offender status was entered on October 8, 1981, (No. 81-CR-0269) in which respondent recieved a sentence of five years upon a plea of guilty to third degree burglary and second degree persistent felony offender. (AP 22-25.)

In State court, respondent argued that each of these two prior convictions were invalid because the State court record did not contain the transcript of guilty plea proceedings nor did it contain a record of colloquy between the court and respondent during the plea proceedings. Respondent contended the pleas were invalid because there was no showing that he knowingly waived the rights guaranteed him under the United States and Kentucky constitutions. The prosecutor filed certified copies of the judg-

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[2]Joint Appendix containing guilty plea documents is cited as "JA". Transcript of evidence at the persistent felony offender pretrial hearing, May 28, 1987, to exclude the prior convictions is cited as "TE" (JA 37 et seq). The state trial court record other than the transcript of evidence is cited as "TR". The state court transcript of evidence and record were filed in the U. S. District Court as part of item 3. The record of the U. S. District Court on the habeas petition will be cited as "HR".

ments entered on the guilty pleas on the prior convictions. The State trial court advised the respondent that this shifted the burden of going forward on his claim of invalidity to him. Respondent argued that under the precedent of the Kentucky Supreme Court, the trial court had correctly stated the law, but he believed that because the records of the two prior convictions contained a "silent record" the earlier plea should be presumed constitutionally invalid. Respondent then took the stand and testified concerning his recollection of the guilty pleas. Respondent testified to the effect that he did not remember whether the trial judge advised him of his constitutional rights in connection with the guilty pleas and was not familiar with trial procedures. (AP 27-33; TE 3-42.)

The Commonwealth called as its witness, Tom Marshall, who had represented respondent in connection with the 1980 guilty plea. Mr. Marshall could not recall his representation of respondent during his testimony at the State court evidentiary hearing, but he did authenticate his signature on a document identified as "form plea of guilty that was used back in . . . 1979." Mr. Marshall confirmed that the certificate on that form showed that he was the attorney of record for respondent, that he had read and fully explained to respondent the allegations contained in the indictment, that he had fully explained his constitutional rights to him, and to the best of his knowledge and belief the statements and representations made by respondent in a written petition on a plea of guilty were accurate and true, and that the plea of guilty was consistent with counsel's understanding of the facts as relayed to him by respondent and was consistent with Marshall's advice to respondent. (TE 43-52) [The form testified to by Mr. Marshall and the State court was added to the habeas

record pursuant to order by the federal district court. Another type of guilty plea form indicating the Commonwealth's recommendation for a plea of guilty, and signed by Mr. Raley and his then attorney, was produced concerning the 1981 guilty plea pursuant to order (HR 5-6) by the Federal District Court. (AP 7-8; JA 2-25)] The State trial court denied respondent's motion to suppress the prior convictions. Respondent then entered a conditional guilty plea pursuant to Kentucky Criminal Rule 8.09 by which to appeal the order denying the motion to suppress the prior convictions used to establish the persistent felony offenders status. (AP 27-33; AP 5-7.)

On April 22, 1988, the Kentucky Court of Appeals affirmed respondent's conviction in an unpublished opinion. It concluded that the 1981 guilty plea conviction was valid and that there was sufficient evidence before the trial court to ascertain in its validity (AP 26-33) and stated in part (AP 32):

> However, while appellant contends that he was ignorant of the charges against him, he acknowledges he signed a form which specifies the charges in which he agreed to plead guilty. Furthermore, the fact that appellant was fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction.

On June 13, 1989, the respondent filed a petition for writ of habeas corpus in the United States District Court attacking his persistent felony offender sentence and in particular the 1981 guilty plea conviction upon which it

was based. The District Court denied the writ essentially agreeing with the Kentucky Court of Appeals. (AP 21-26.)

On September 19, 1991, the Sixth Circuit issued an opinion upholding the 1980 guilty plea but concluding that the Commonwealth had failed to prove the validity of the 1981 guilty plea. The Sixth Circuit panel found that it was bound by the previous Sixth Circuit opinion in *Dunn* v. *Simmons*, 877 F.2d 1275 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1539 (1990). (AP 13.) The Sixth Circuit stated in part (AP 10 and AP 20):

> [Respondent] correctly notes that in *Dunn* we established that a State may not carry its burden under *Boykin* by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. He once again correctly notes that we specifically disapproved in *Dunn* of the burden-shifting procedure that the trial court used in this case. . . . [T]he District Court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under . . . *Dunn* v. *Simmons* on Raley's contention regarding his 1981 conviction. [Citations omitted.]

SUMMARY OF ARGUMENT

I. The rule established by this Court in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), requiring a plea colloquy, applies to a direct appeal from a conviction, but not a collateral attack. A collateral attack is not a substitute for an appeal. A rule to the contrary, as applied by the Sixth Circuit in this case, rewards a criminal defendant for deferring a constitutional claim, e.g., *Boykin* error, until a collateral attack or sentence enhancement hearing. The *Boykin* colloquy is merely a prophylactic rule intended to eliminate unintelligent admissions of guilt but is not itself constitu-

tionally required. This Court has repeatedly stated that a voluntary guilty plea on advice of counsel may only be collaterally attacked by the defendant demonstrating ineffective assistance of counsel.

II. On collateral attack, since the standard for reversible error is greater than for direct appeal, the defendant (or habeas petitioner) must bear the burden of proof to demonstrate constitutional error. In this case, the record establishes that respondent received counsel, plead guilty with counsel's advice, and received the minimum sentence authorized as a result of the plea bargain. Respondent did not claim ineffective assistance of counsel nor claim that he did not know his constitutional rights regarding the plea. Respondent merely claimed that he did not remember if he knew his rights.

III. The Sixth Circuit erred by imposing a standard of proof on the prosecution of "clear and convincing" evidence since neither this Court nor other Federal Courts of Appeals have imposed that standard as a federal constitutional requirement.

IV. A court reviewing a collateral attack upon a guilty plea may properly consider the experience and knowledge gained by the habeas petitioner in previous criminal proceedings.

V. The Kentucky sentencing court, Kentucky Court of Appeals, and Federal District Court, all found that respondent knew his constitutional rights at the time of his 1981 guilty plea because of the knowledge he obtained at his 1979 guilty plea proceeding. Hence even if the Commonwealth had the burden of proof that burden was satisfied.

ARGUMENT

I. *Boykin* Did Not Establish A Ground For Collateral Attack.

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), this Court reversed a guilty plea conviction in which the death penalty was imposed on certiorari from a direct appeal taken to the Alabama Supreme Court. The Court held, U.S. at 242:

> It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.

In cases subsequent to *Boykin*, the Court has ruled that the Eighth Amendment imposes additional safeguards in order to insure the reliability of a death sentence, but those procedures are not applicable to a non-capital case. See, e.g., *Harmelin* v. *Michigan*, 111 S.Ct. 2680 at 2701-2702 (1991); and *Sawyer* v. *Smith*, 110 S.Ct. 2822 (1990).

Approximately a year and a half after *Boykin* was decided, this Court upheld the guilty plea conviction in which the sentencing judge had not conducted a colloquy as described in *Boykin*. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Upholding the validity of the guilty plea, the Court cited *Boykin* and stated in part, U.S. at 31:

> The standard [for determining the validity of a guilty plea] was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . That he

> would not have pleaded guilty except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

Subsequently, this Court has never ruled that the failure of the state court record to show a *Boykin* colloquy is by itself grounds for collateral relief under the federal habeas corpus statute. See Annotation, "Validity of Guilty Pleas - Supreme Court Cases," 25 L.Ed.2d 1025 at 1030 and at 1054-1055.

This Court has repeatedly emphasized that federal habeas corpus proceedings are not simply an appeal of a conviction. "[W]e have long and consistently held that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, at 165 (1982). "We remain convinced that the burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal." *Engle* v. *Isaac*, 456 U.S. 107 at 134-135 (1982). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, at 887 (1983). "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Strickland* v. *Washington*, 466 U.S. 668, at 697 (1984). The Court has repeatedly recognized "the important distinction between direct review and collateral review" and that "the interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague* v. *Lane*, 489 U.S. 288, at 307 and 308 (1989). See also *United*

States v. *Jones*, 907 F.2d 456, at 480-484 (4th Cir. 1990) (Wilkinson, J., dissenting in part).

The Sixth Circuit's rule regarding collateral attacks on guilty pleas, exemplified by its opinion in this case, after having been reinvigorated by *Dunn* v. *Simmons*, 817 F.2d 1275 (6th Cir. 1990), *cert. denied*, 110 S.Ct. 1539 (1990), actually rewards a criminal defendant for delaying the attack upon his guilty plea. Under the Sixth Circuit's rule, a defendant *should not appeal* his conviction to contest the validity of his guilty plea. Instead he should wait until after he has been charged as a repeat offender (Ky.Rev. Stat. 532.080), so that he may collaterally attack his guilty plea and thereby impose on the prosecution the burden of "clear and convincing" evidence to establish the validity of his guilty plea, years after the plea was entered and even after its sentence was completely served.

In contrast to the Sixth Circuit, this Court, as previously noted, had repeatedly rejected any policy which has the effect of encouraging criminal defendants to forsake raising constitutional claims on direct appeal of their conviction in order to defer constitutional claims against that conviction for a collateral attack, which may be filed years after the conviction was entered, under Title 28 U.S.C. Section 2254 or 2255. In *Coleman* v. *Thompson*, 111 S.Ct. 2546 at 2561-2565 (1991), the Court reinstated the rule of *Daniels* v. *Allen*, 344 U.S. 443 at 482-489 (1953), to the extent of requiring "cause and prejudice" for failure to file an appeal within the time required by state law. Also see *Clark* v. *Texas*, 788 F.2d 309 (5th Cir. 1986); *Williams* v. *Arkansas*, 941 F.2d 672 (8th Cir. 1991); *Gilbert* v. *Scott*, 941 F.2d 1065 (10th Cir. 1991). In the *Daniels* case, the Court noted that the constitutionality of a state prisoner's detention "is not to be tested by the use of

habeas corpus in lieu of an appeal. To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." 344 U.S. at 485. Justice Jackson (concurring in the result) noted, 344 U.S. at 541 and 547:

> A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.
>
> • • • •
>
> Presumably a federal court will not release a convict until he proves facts which show invalidity of his conviction.

The *Boykin* warning like the *Miranda* warning is merely a prophylactic rule, not itself required by the Constitution but which aids the reviewing Court in determining whether or not a constitutional violation occurred. In *Duckworth* v. *Eagan*, 492 U.S. 195 at 212 and 213 (1989), Justice O'Connor (concurring) pointed out:

> Our jurisprudence has long recognized a distinction between direct and collateral review, and I am not the first Justice of this Court to suggest that prophylactic rules should be treated differently in collateral proceedings than on direct review. [Citations omitted.] . . . As noted above, the Court has long recognized that habeas corpus has been traditionally governed by equitable principles, and thus has long defined the scope of the writ by reference to a balancing of state and federal interests[.] [Citations omitted.]

In *McClesky* v. *Zant*, 111 S.Ct. 1454 at 1468-1469 (1991), the Court noted:

> In habeas [proceedings], equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. . . . [W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication. . . . [W]e have taken care in our habeas corpus decisions to reconfirm the importance of finality.
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> • • •
>
> Federal collateral litigation places a heavy burden on some federal judicial resources, and threatens the capacity of the system to resolve primary disputes. Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and *may establish disincentives to present claims when evidence is fresh.* [Citations and internal quotations omitted. Emphasis added.]

In *United States* v. *Timmreck*, 441 U.S. 780 (1979), the Court held that a violation of Rule 11 of the Federal Rules of Criminal Procedure in accepting the guilty plea did not authorize a collateral attack pursuant to Title 28 U.S.C. §2255. The Court stated in part, U.S. at 784:

> Nor can any claim reasonably be made that the error here resulted in a complete miscarriage of justice or in a proceeding inconsistent with rudimentary demands of fair procedure. Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial he would not have pleaded guilty. His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal, but was not . There is no basis for allowing collateral attack to do service for an appeal. . . . For the concern with finality served

> by the limitation on collateral attack has special force with respect to convictions based on guilty pleas. Every inroad on the concept of finality undermines confidence in the integrity of our procedure; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new rules for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea. [Citations and internal quotations omitted.]

In *Mabry* v. *Johnson*, 467 U.S. 504 at 508-509 (1984), the Court upheld the validity of a guilty plea entered in Arkansas state court system and stated in part:

> It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. It is also well settled that plea agreements are consistent with the requirements of voluntariness and intelligence because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained for exchange. It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired.

In *Hill* v. *Lockhart*, 474 U.S. 52 at 56-57 (1985), the Court upheld the validity of a guilty plea in the Arkansas state court system and stated in part:

> Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel the voluntariness of the plea depends upon whether counsel's advice was within the range

> demanded of attorneys in criminal cases. As we explained in *Tollett* v. *Henderson,* 411 U.S. 258 (1973), a defendant who pleads guilty upon the advice of counsel may *only* attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson,* 397 U.S. 759, at 267 (1970)]. [Citation and internal quotations omitted. Emphasis added.]

In *United States* v. *Broce,* 488 U.S. 563 at 569 (1989), the Court upheld the validity of a guilty plea in federal court and stated in part:

> [W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction, and the plea, as a general rule, foreclose the collateral attack.

In *Stano* v. *Dugger,* 921 F.2d 1125, 1141 (11th Cir. 1991) (en banc), the Eleventh Circuit upheld a guilty plea and death sentence. The Court quoted from *Frank* v. *Blackburn,* 646 F.2d 873 at 882 (5th Cir. 1980) (en banc), modified on other grounds, 646 F.2d 902 (5th Cir.) (per curiam), *cert. denied,* 454 U.S. 840 and stated in part:

> If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea will be upheld on federal review. [Internal quotation marks omitted.]

Also see *Moore* v. *Jarvis,* 885 F.2d 1565 at 1573 (11th Cir. 1989) (Cox, J., dissenting), "It is clear in this circuit that the absence of a *Boykin* hearing does not, without

more, subject the convictions in question to collateral attack."; *Green* v. *United States*, 880 F.2d 1299 at 1305 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1322.

In *Winford* v. *Swenson*, 517 F.2d 1114 (8th Cir. 1975), *cert. denied*, 423 U.S. 1023, the Eighth Circuit upheld a guilty plea, predating *Boykin*, to the offense of second degree murder. The Eighth Circuit stated in part, 517 F.2d at 117-118:

> Indeed, the Supreme Court has made it clear that a counseled guilty plea made by a competent defendant aware of the nature of the charge against him and induced by his desire to limit the possible penalty will not be set aside simply because the defendant later learns of constitutional rights which he did not know at the time the plea was entered. A guilty plea entered with the assistance of counsel is presumptively valid. [Citations omitted.]

As the Sixth Circuit noted in *Hendron* v. *Cowan*, 532 F.2d 1081 (6th Cir. 1976), the majority of the federal courts of appeal have held that *Boykin* would not be applied retroactively. The fact that *Boykin* has not been applied retroactively and has not been cited in the opinions issued by this Court as an essential component of federal due process for collateral attack clearly indicates that the failure to comply with *Boykin* is not a fundamental defect justifying a collateral attack on a guilty plea. Also see *Boykin*, 395 U.S. at 247-249 (Harlan, J., dissenting), citing *Halliday* v. *United States*, 394 U.S. 831 (1969). "*Alford* made clear that lack of a verbatim transcript demonstrating that the trial judge admonished the defendant in a manner consistent with *Boykin* is not constitutionally required." *United States ex rel. Grundset* v. *Franzen*, 675 F.2d 870 at 877 (7th Cir. 1982). In *Brown* v. *Jernigan*, 622 F.2d 914

at 915 (5th Cir. 1980), *cert. denied*, 449 U.S. 958, the Fifth Circuit stated:

> Although by pleading guilty the defendant waives the right to a jury trial, the privilege against self-incrimination, and the right of confrontation, neither the Constitution nor any rule of criminal procedure requires express articulation and specific waiver of these rights before a guilty plea may be accepted.

Subsequent to *Timmreck*, this Court defined fundamental miscarriage of justice as "when a constitutional violation probably has caused the conviction of one innocent of the crime." *McClesky* v. *Zant*, 111 S.Ct. at 1470, citing *Murray* v. *Carrier*, 477 U.S. 878 at 485 (1986). Regarding the omission of rudimentary procedure standard of *Timmreck*, the Court has recognized the unconstitutional denial of counsel to an indigent and a coerced guilty plea may be collaterally attacked. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Machibroda* v. *United States*, 368 U.S. 487 (1962).

Many of the other courts have limited the extent to which a counseled guilty plea may be collaterally attacked or effectively presumed the validity of a guilty plea on advice of counsel. *Robards* v. *Rees*, 789 F.2d 379 at 385-386 (6th Cir. 1986); *United States* v. *Wilkinson*, 926 F.2d 22 at 28-29 (1st Cir. 1991); *State ex rel. Collins* v. *Superior Court of Maricopa County*, 157 Ariz. 71, 754 P.2d 1346 at 1349 (1988) [limited to right to counsel violation]; *State* v. *Wright*, 198 Conn. 273, 502 A.2d 911 at 917 (1986); *State* v. *Cooley*, 471 N.W.2d 786 (Iowa 1991); *Hall* v. *State*, 273 Ind. 507, 405 N.E.2d 530 at 536 (1980) [limited to right to counsel violation]; *Corbett* v. *Commonwealth*, 717 S.W. 2d 831 at 835 (Ky. 1986) [limited to right to counsel violation]; *State* v. *Goff*, 418 N.W.2d 169 at 172 (Minn. 1988)

[limited to right to counsel violation]; *State* v. *Wilson*, 684 S.W.2d 544 at 547 (Mo.App. 1985) [limited to right to counsel violation]; *State* v. *Hargrove*, 104 N.C.App. 194, 408 S.E. 2d 757 at 759-760 (1991) [limited to right to counsel violation]; *Hanson* v. *State*, 716 P.2d 688 (Okla. Crim. 1986); *State* v. *Annino*, 46 Or.App. 743, 613 P.2d 84 (1980). Allowing a criminal defendant to collaterally attack a prior conviction during sentencing on a subsequent offense for any ground would result in retrying most prior convictions. See *United States* v. *Ruo*, 943 F.2d 1274 at 1276 (11th Cir. 1991), "It would approach the absurd to require the government to undertake to prove guilt all over again in every predicate conviction." Collateral attacks upon guilty pleas must be limited to cases where defendant demonstrates his apparent innocence, coerced guilty pleas, or the unconstitutional denial of counsel.

Raley failed to raise any defects regarding his 1981 guilty plea on direct appeal. The evidence presented by Raley in the 1987 collateral attack regarding the persistent felony offender charge does not establish a constitutional violation of sufficient magnitude to warrant collateral relief, i.e., an involuntary or incompetent guilty plea under the standards set forth in *Johnson* v. *Mabry, supra,* and *Hill* v. *Lockhart*. The state court's reliance upon a counseled guilty plea in determining respondent's sentence under the Kentucky persistent felony offender statute does not establish a sentence so unreliable as to constitute a federal due process violation. See *Townsend* v. *Burke*, 344 U.S. 736 (1948); *Zant* v. *Stephens*, 462 U.S. 862, at 902-903 (1983) (Rehnquist, J., concurring in judgment). As the Court noted in *Marshall* v. *Lonberger*, 459 U.S. 422, at 438, n. 6 (1983), "It has never been thought that decisions under the Due Process Clause establish this Court as a

rule-making organ for the promulgation of state rules of criminal procedure." [Citation and brackets omitted]. As required by the *Lonberger* opinion, the evidence in the state court record in this case is sufficient to demonstrate, and the two state courts found, that respondent was aware of the charge to which he pleaded guilty in 1981. (JA 17-18 HR 6).

A collateral attack is not a substitute for direct appeal. A higher standard of review is required for a collateral attack than direct appeal from the conviction. The Eleventh Circuit has apparently concluded that collateral review of a conviction solely for sentencing on a subsequent offense is not constitutionally required. See *United States* v. *Williams*, 954 F.2d 668 at 673 (11th Cir. 1992). Permitting defendants to collaterally attack a prior conviction introduced for sentencing encourages defendants to withhold constitutional claims until a subsequent offense proceeding in the hope that the prosecution will be unable to disprove such claims at that time. The precedents of this Court clearly establish that collateral use of a conviction by the prosecution is barred only when the defendant was unconstitutionally denied the right to counsel or coerced into pleading guilty. Detailed review of a prior conviction of the type required by the Sixth Circuit in connection with sentencing for a subsequent offense results in retrying the prior offense or trying the circumstances of a guilty plea to the prior offense, and rewards the defendant for his delay in presenting the claim. *Boykin* errors have never been recognized by this Court as ground for collateral attack. *Boykin* is merely a prophylactic rule and as such does not justify collateral relief.

Respondent's habeas corpus petition did not present an issue justifying federal habeas corpus review.

II. In a Collateral Attack Upon a Prior Conviction Offered By the Prosecution for Sentencing Enhancement, the Defendant Must Bear the Burden of Proving the Invalidity of the Prior Conviction.

In *Loper* v. *Beto*, 405 U.S. 473 (1972), this Court vacated the judgment of the Fifth Circuit allowing the conviction to stand and remanded for further proceedings because of evidence presented by Loper (the habeas petitioner) to the federal district court that he was in fact denied his right to counsel regarding his previous four felony convictions that were introduced by the state during his trial to impeach his testimony. Chief Justice Rehnquist filed a dissenting opinion in that case, 405 U.S. at 499-502, in which he was joined by then Chief Justice Burger, and Justices Blackmun and Powell, citing *Johnson* v. *Zebst*, 304 U.S. 458, at 468-469 (1938). Also see *Loper* v. *Beto*, 405 U.S. at 495-496 (Blackmun, J., dissenting); *Id.*, U.S. at 485 (White, J., concurring in judgment). The Chief Justice stated in part:

> In *Johnson* v. *Zebst*, [supra], one of the landmark habeas corpus decisions of this Court, Mr. Justice Black said: "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a habeas hearing, he does meet this burden and convinces the court by a preponderance of the evidence that he neither had counsel nor properly waived his constitu-

tional right to counsel, it is the duty of the court to grant the writ."

* * *

Under *Johnson* v. *Zebst,* the burden in federal habeas corpus is upon [the petitioner] to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel. Here petitioner explicitly testified in a manner that, if the trial judge had chosen to believe him, would indeed have established that he did not waive his right to counsel in the Mississippi proceedings and thus those convictions were obtained in violation of *Gideon* v. *Wainwright* [372 U.S. 335 (1963)]. However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of the cases both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of an interested witness.

The plurality of the Court in *Loper* v. *Beto,* 405 U.S. at 479, n.6, stated in part:

A dissenting opinion, *Post,* at 502, implies that the district court found that the *petitioner did not meet his burden of proving* that he had not waived his right to counsel in the Mississippi and Tennessee courts.

* * *

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the district court quoted above, did not rest its decision on a finding that the *petitioner failed to meet his burden of proving the invalidity of the prior convictions.* We reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss the case or affirm the decision below on the ground that the *petitioner did not meet his burden of proving that the prior convictions were invalid.* [Emphasis added.]

Also see *Phillips* v. *Commonwealth*, 559 S.W.2d 724 (Ky. 1977), and *State* v. *Annino*, 46 Or.App. 743, 613 P.2d 84 (1984), both discussing the *Loper* opinion.

In *Alvey* v. *Commonwealth*, 648 S.W.2d 850 at 860 (Ky. 1983), the Kentucky Supreme Court noted:

> There is a substantial difference between a situation in which the record in a guilty plea proceeding does not pass constitutional muster, and one in which post-conviction proceedings are filed after a defendant has already had an opportunity to raise issues about the validity of the earlier guilty pleas but has failed to do so. In the latter instance we should not afford the defendant a second bite at the apple. Moreover, we fail to see that there is any constitutional impediment in following such a course since we do not believe that the persistent felony offender type of situations was anticipated or was it meant to be encompassed in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Also see *Gross* v. *Commonwealth*, 648 S.W.2d 853 at 855-856 (Ky. 1983). In *Commonwealth* v. *Gadd*, 665 S.W.2d 915 (Ky. 1984), Gadd was convicted of being a persistent felony offender in the first degree and claimed that his prior convictions utilized to establish his status as a persistent felony offender were constitutionally deficient. The Kentucky Supreme Court upheld the conviction and stated in part, 655 S.W.2d at 917 and 918:

> A duly authenticated record of a judgment and conviction which is silent on the exercise of constitutional rights is prima facie evidence to establish the fact of conviction. It is a fact of conviction which the Commonwealth seeks to prove in introducing the judgment against a defendant charged as a persistent felon. KRS 532.080 does not specify that the Commonwealth must affirmatively prove both the fact of conviction

and that the previous conviction was not obtained by constitutionally impermissible means.

* * *

Phillips [v. *Commonwealth,* 559 S.W.2d 724 (Ky. 1977),] suggests that where the record is silent the defendant has both the burden of proving that the prior conviction was constitutionally invalid and the right to be heard on the subject during the progress of the current proceedings. . . . The question of some underlying constitutional infirmity should be raised by the defendant and decided before a trial is a threshhold issue to the admissibility of the evidence of the conviction at trial itself. . . . Although we recognize with reluctance that this may be a burden to the trial court, it is our belief that the United States Supreme Court decisions require this procedure.

Thus, the Kentucky Supreme Court concluded that the Commonwealth was not required to prove the validity of prior convictions offered for sentencing enhancement under the persistent felony offender statute. The Kentucky Supreme Court's ruling on this should have been accepted by the federal habeas court. See *Martin* v. *Ohio,* 480 U.S. 228, 232 (1987).

In *Curl* v. *Superior Court,* 51 Cal.3d 1292 at 1304 (1991), the California Supreme Court quoted from this Court's opinion in *Darr* v. *Burford,* 339 U.S. 200 at 218 (1950), as follows:

A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused.

The United States Courts of Appeal, including the Sixth Circuit, have unanimously placed the burden of proof on the defendant to establish the invalidity of a prior conviction used for purposes of establishing the defendant's criminal history score under the federal sentencing guidelines. See U.S.S.G. Commentary, Application note 6, Section 4A 1.2 and Section 4B 1.1. *United States* v. *Unger*, 915 F.2d 759 at 761 (1st Cir. 1990); *United States* v. *Davenport*, 884 F.2d 121 at 124 (4th Cir. 1989); *United States* v. *Woods*, 870 F.2d 285 at 287 (5th Cir. 1989); *United States* v. *Bradley*, 922 F.2d 1290 at 1297 (6th Cir. 1991); *United States* v. *Brown*, 889 F.2d 677 at 679 (7th Cir. 1990); *United States* v. *Dickens*, 879 F.2d 410 at 411-412 (8th Cir. 1989); *United States* v. *Newman*, 912 F.2d 1119 at 1121 (9th Cir. 1990). Also see *United States* v. *Clark*, 735 F.Supp. 861 (N.D. Ill. 1990) [placing burden on the defendant does not conflict with the decisions of this Court].

More recently, in cases involving collateral attacks on prior convictions in the state courts offered to enhance the defendant's sentence under either the Armed Career Criminal Act or Violent Career Criminal Act, Title 18 U.S.C. Section 924(e), Section 922(g), and Appendix Section 1202(a)(1), which imposes a minimum sentence of 15 years incarceration without the possibility of parole, the Seventh Circuit has imposed the entire burden of proof to establish the invalidity of a previous guilty plea conviction upon the defendant. *United States* v. *Gallman*, 907 F.2d 639 at 642-644 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1110; *United States* v. *Polk*, 908 F.2d 212 (7th Cir. 1990); *United States* v. *Boyer*, 931 F.2d 1201 at 1204-1205 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 534 [Federal trial judge was entitled to discredit the defendant's own self-serving testimony]; *United States* v. *Henry*, 933 F.2d 553 at 559-560 (7th Cir.

1991); *United States* v. *Ferguson,* 935 F.2d 862 (7th Cir. 1991). Also see *United States* v. *Wilkinson,* 926 F.2d 22 at 28-29 (1st Cir. 1991), *cert. denied,* 111 S.Ct. 2813 [collateral attack on prior conviction offered for Career Criminal Act enhancement rejected without proof by government]. The Eleventh and Eighth Circuits have specifically adopted the Seventh Circuit's opinion in *Gallman* to require that the defendant seeking to invalidate a prior conviction offered under the Career Criminal Act must bear the burden of proof. *United States* v. *Ruo,* 943 F.2d 1274 (11th Cir. 1991); *United States* v. *Day,* 949 F.2d 973 at 982-983 (8th Cir. 1991).

Fifteen other states apparently follow a rule similar to that of Kentucky and California regarding the denfendant's burden in collaterally attacking a prior conviction offered for sentence enhancement. *State ex rel. Collins* v. *Superior Court, Maricopa County,* 157 Ariz. 71, 754 P.2d 1346 (1988); *Watkins* v. *People,* 655 P.2d 834 at 837 (Colo. 1983); *Lacy* v. *People,* 775 P.2d 1 at 6-7 (Colo. 1989), *cert. denied,* 110 S.Ct. 350; *State* v. *Wright,* 198 Conn. 275, 502 A.2d 911 at 917 (1986); *Hall* v. *State,* 273 Ind. 507, 405 N.E. 2d 530 at 536 (1980); *State* v. *Cooley,* 471 N.W.2d 786 (Iowa 1991); *State* v. *Goff,* 418N.W.2d 169 (Minn. 1988); *State* v. *Wilson,* 684 S.W.2d 544 at 548-549 (Mo.App. 1985); *Dressler* v. *State,* 819 P.2d 1288 (Nev. 1991); *State* v. *Desbiens,* 117 N.H. 433, 374 A.2d 651 at 653 (1977); *State* v. *Harper,* 126 N.H. 815, 498 A.2d 310 at 315 (1985) ["We conclude that the defendant has not met her burden under *Desbiens* of going forward with evidence"]; *State* v. *O'Neil,* 91 N.M. 727, 580 P.2d 495 at 497-498 (N.M.App. 1978); *People* v. *Harris,* 61 N.Y.2d 9 at 15, 471 N.Y.S.2d 61 at 63, 459 N.E.2d 170 at 172 (1983); *People* v. *West,* 110 A.D.2d 971, 488 N.Y.S.2d 268 at 270 (N.Y.App. 1985), appeal denied, 65

N.Y.2d 989 [applying *Harris*]; *State* v. *Hargrove,* 104 N.C. App. 194, 408 S.E.2d 757 (1991); *Hanson* v. *State,* 716 P.2d 688 (Okla.Crim. 1986); *State* v. *Annino,* 46 Or.App. 743, 613 P.2d 84 (1980); *State* v. *King,* 400 N.W.2d 878 at 879 (S.D. 1987); *Stuck* v. *Leapley,* 473 N.W.2d 476 (S.D., 1991) [discussing *King* and *Dunn* v. *Simmons*]. Also see *Ex Parte Scott,* 460 So.2d 1371 at 1374 (Ala. 1984) [prior conviction may not be collaterally attacked in habitual criminal proceeding]; *State* v. *Oliver,* 230 Neb. 864, 434 N.W.2d 293 at 297-298 (1989) [same].

As the Seventh Circuit observed in *United States* v. *Boyer, supra,* 931 F.2d at 1205:

> In our case, Boyer can only muster self-serving testimony to support his claim and even this testimony is equivocal. Boyer did not testify at the sentencing hearing that the trial court failed to admonish him, just that he could not remember receiving any warnings. As we stated in *Gallman,* the claim that one could not remember being informed of one's rights is not the same as claiming that one was not so informed . . . In any event, other evidence was available that Boyer did not pursue. For example, Boyer did not call trial counsel who represented him in his earlier plea hearings to testify about whether he received his warnings. Also, Boyer has never, until now, challenged the validity of his sentences; he did not take a direct appeal from the convictions, nor has he ever challenged his convictions collaterally. In fact he does not even now contend the convictions were invalid in and of themselves, only that they were invalid enough to preclude their use to enhance his present sentence. In conclusion, Boyer's presentation at the hearing was insufficient to carry his burden of proof on the question of the constitutionality of his prior convictions. [Citations and internal quotation marks omitted.]

In *United States* v. *Henry,* 933 F.2d at 559, the Seventh Circuit stated in part:

> [T]he district court found that Henry's pleas were "invulnerable to constitutional attack," *Henry,* 713 F. Supp. [1182] at 1192, because the constitution does not require the specific admonitions in *Boykin* as a condition precedent to the validity of a guilty plea. To reach this conclusion, the court observed that five years after *Boykin,* the Supreme Court proposed an amendment to the Federal Rule of Criminal Procedure 11 to prescribe the kind of admonition that should be given to a federal defendant as a precondition to a guilty plea. The proposed amendment stated that the court could comply with *Boykin's* mandate merely by explaining to defendants that they have the right to plead guilty and that, if they plead guilty, they waive the right to trial. In other words, a court need not comply with *Boykin* literally. All a court need do to give the constitutional required minimum warnings is to comply with the more general language of the Supreme Court's proposal. Several of the circuits similarly agree that the failure to advise a defendant of each right enumerated in *Boykin* does not automatically invalidate the plea.

In *Honeycutt* v. *Ward,* 612 F.2d 36 (2nd Cir. 1979), Honeycutt filed a habeas petition attacking his life sentence under the then existing New York habitual criminal statute because of prior convictions in New York, Oklahoma, and California, which he claimed to be constitutionally infirm. The Second Circuit stated in part, 612 F.2d at 41:

> Furthermore, the burden of proof is on Honeycutt to overcome the strong presumption of regularity in state judicial proceedings. His own self-serving declarations do not meet this burden.

In *Strozier* v. *Newsome*, 926 F.2d 1100, at 1104 (11th Cir. 1991), the Eleventh Circuit reiterated its previous rule placing the burden of proof on the habeas petitioner to establish that he did not validly waive counsel in collaterally attacking a previous conviction. In *Lowenfield* v. *Phelps*, 817 F.2d 285, at 296 (5th Cir. 1987), affirmed on other grounds, 484 U.S. 231 (1988), the Fifth Circuit held that the habeas petitioner would have the burden of proving the invalidity of a prior conviction introduced by the state in a capital sentencing proceeding.

The Sixth Circuit opinion in this case cites *Fox* v. *Kelso*, 911 F.2d 563 at 570 (11th Cir. 1990), to support the Sixth Circuit's position that the entire burden of proving the validity of a conviction involving a silent record falls on the state in the habeas corpus proceeding. However, the Eleventh Circuit's opinion in *Fox* v. *Kelso* does not, in fact, establish such a burden. The Eleventh Circuit opinion in that case, states in pertinent part:

> In habeas challenges to the validity of a guilty plea, however, courts uniformly assigned to the state (*once the petitioner satisfies his threshold burden of showing noncompliance* with the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 [1969]), the burden of showing that the plea was obtained constitutionally. [Parenthetical phrase in original. Footnotes and citations omitted. Emphasis added.] Although the decision in *Clayton* v. *Blackburn*, 578 F.2d 117 (5th Cir. 1978), appears to place the burden on the petitioner, we conclude that it refers only to initial threshold burden on the petitioner to present a *prima facie* case. See [*United States ex rel Grundset* v.] *Franzen*, 675 F.2d [870] at 877 [7th Cir. 1982]. From the record, it is apparent that *Fox demonstrated* that his guilty pleas were not taken in accordance with the procedures mandated in *Boykin*,

> thereby *shifting to the state* the burden to prove that they were nonetheless knowing and intelligent. [Emphasis added.]

As the Sixth Circuit opinion points out the Eleventh Circuit in *Fox* v. *Kelso* collects a number of cases from other circuits. Eliminating the cases from the Sixth Circuit and eliminating cases involving guilty pleas prior to *Boykin* since *Boykin* has been deemed not to apply retroactively, *Hendron* v. *Cowan*, 532 F.2d 1081 (6th Cir. 1976) [collecting cases], only two circuits have apparently placed the initial burden on the prosecution to establish the validity of a guilty plea involving a silent or partially silent state court record. *United States* v. *Pricepaul*, 540 F.2d 417 (9th Cir. 1976); *Sena* v. *Romero*, 617 F.2d 579 at 580 (10th Cir. 1980), which expressly relies upon *Pricepaul*. In *Pricepaul*, the Ninth Circuit did place the initial burden on the prosecution to establish compliance with *Boykin* if the state court record was silent. However, the Ninth Circuit also stated as follows, 540 F.2d at 423:

> In these circumstances, it seems unfortunate to shift the burden to the government to prove compliance with *Boykin* if the defendant is unwilling to submit an affidavit specifically alleging that he did not voluntarily and intelligently waive the rights protected by *Boykin*. Because of this, if we were writing on a clean slate, we would hold that the burden shifts to the government to prove the guilty plea was voluntarily and intelligently made only after the person convicted (1) demonstrates that the record is silent as to whether the *Boykin* procedures were followed (neutral showing) (and (2)) offers an affidavit or other testimony alleging that in fact the required waiver procedure did not occur (positive showing). [Parenthetical phrases in original.]

Subsequently, the Ninth Circuit receded from the rule of *Pricepaul* and in effect now follows the above quoted dicta. *United States* v. *Goodheim*, 651 F.2d 1294 at 1297-1299 (9th Cir. 1981), appeal after remand, 686 F.2d 776 at 777-778 (9th Cir. 1982) [upholding prior conviction]; also see *United States* v. *Newman*, 912 F.2d 1119 at 1121-1122 (9th Cir. 1990) [placing burden on defendant]; *United States* v. *Dickens*, 879 F.2d 410 at 411-412 (8th Cir. 1989) [discussing *Goodheim II*, and other cases]. In *Goodheim*, 651 F.2d at 1298 and 1299, the Tenth Circuit stated in part:

> We next consider whether Goodheim established that his conviction was constitutionally infirm in the district court. * * * Goodheim has done more than establish that the record was silent with respect to *Boykin* waivers. His declaration, in combination with the silent record satisfies a more stringent showing we indicated in *Pricepaul* we would have preferred to require. [Citations and paragraph breaks omitted.]

As previously noted, the Seventh Circuit in *United States ex rel. Grundset* v. *Franzen*, 675 F.2d 870 at 877-880 (7th Cir. 1982), has placed the initial burden on the habeas corpus petitioner to establish the invalidity of a guilty plea under collateral attack. In that case the Seventh Circuit stated, 675 F. 2d at 880:

> We do not believe that an evidentiary hearing is necessary in this case. If such a hearing were held, *the initial burden would be on the petitioner.* Grundset, however, has repeatedly asserted that he is unable to offer any additional evidence as to what transpired at his guilty plea proceeding [other than the fact that he cannot remember]. In the absence of convincing independent evidence that Grundset was not admonished in accordance with *Boykin*, his petition for habeas relief must be denied. [Emphasis added.]

As the Eighth Circuit opinion in *United States* v. *Dickens*, 879 F.2d at 411-412 notes, in *Luna* v. *Black*, 772 F.2d at 488 at 450 (8th Cir. 1985), the Eighth Circuit placed the initial burden establishing invalidity of a guilty plea on the habeas petitioner. "Where, however, records of prior convictions are silent as to whether counsel was present at a critical stage and *where the accused introduces evidence* tending to show that he was not in fact so represented, the burden then shifts to the state to prove that the accused was represented." [Emphasis added.]

As the former Fifth Circuit noted in *Frank* v. *Blackburn*, 646 F.2d 873, at 882 (5th Cir. 1980) (en banc), modified in other grounds, 646 F.2d 902 (5th Cir. 1981) (per curiam), *cert. denied*, 454 U.S. 840 (1981):

> Because [Federal Criminal] Rule 11 is not binding on the states, a federal court reviewing a state court plea bargain may only set aside a guilty plea or plea agreement which fails to satisfy due process. If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea and any concomitant agreement will be upheld on federal review.

The Fifth Circuit at least in certain contexts has upheld placing the burden of proof on the defendant (or habeas petitioner) even when a state conviction is collaterally attacked under Title 28 U.S.C. §2254. See *Bouchillon* v. *Estelle*, 628 F.2d 926, at 928 (5th Cir. 1980); *Walker* v. *Maggio*, 738 F.2d 714, at 717 (5th Cir. 1984), *cert. denied*, 469 U.S. 1112.

In *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985), this Court stated in part:

> Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. . . . [A] defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent character of a guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson*, 397 U.S. 759 (1970)]. [Citations and quotation marks omitted.]

As was also noted in *Hill* v. *Lockhart*, the convicted defendant (or habeas petitioner) bears the burden of proof to establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668, at 687-696 (1984). A defendant who belatedly attacks a guilty plea at which the advice and assistance of counsel was made available to him should be required to bear the burden of proof pursuant to *Hill* and *Strickland*.

The Sixth Circuit was in error in placing the entire burden of proof upon the Commonwealth of Kentucky to establish the voluntariness and validity of the respondent's prior guilty plea in connection with the persistent felony offender charge brought against him.

III. Even Assuming That the Prosecution Must Bear the Burden of Proof, the Standard for That Burden Should Be Preponderance Rather Than "Clear and Convincing" Evidence.

As previously noted in this brief, in *Johnson* v. *Zerbst*, 304 U.S. 458 at 468-469 (1938), the Court held that the habeas petitioner should be required to prove his claim by preponderance of the evidence. In *Colorado* v. *Connelly*, 479 U.S. 157 at 167-170 (1968), this Court expressly rejected

the "clear and convincing evidence" standard regarding the prosecution's burden of proof to establish a waiver of rights for a confession, and instead adopted the preponderance of the evidence standard. In *Patterson* v. *Illinois*, 487 U.S. 285 at 299, n.12 (1988), the Court noted that the *Miranda* waiver rule was in fact derived from the waiver rule for the Sixth Amendment right to counsel. Moreover, in contrast to a confession which is frequently made during police interrogation isolated from public view, a guilty plea is made or entered in a public court where the opportunity of persons not involved in the process to observe the proceedings is constitutionally required by the Sixth Amendment's guarantee of a public trial.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 at 85 (1986), this Court held that sentencing factors may be proved by preponderance of the evidence when authorized by state law. In *United States* v. *Newman*, 912 F.2d 1119 at 1122 (9th Cir. 1990), the Ninth Circuit relied on *McMillan* in concluding that a criminal defendant who contests the validity of a prior guilty plea conviction should be required to prove its invalidity by preponderance of the evidence.

The Sixth Circuit's opinion in this case is expressly based upon *Dunn* v. *Simmons*, 877 F.2d 1275 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1539 (1990). The Sixth Circuit's opinion in *Dunn* v. *Simmons* is based upon *Roddy* v. *Black*, 516 F.2d 1380 (6th Cir. 1975) [denying habeas corpus relief]. *Roddy* v. *Black*, was based primarily upon *Le Blanc* v. *Henderson*, 478 F.2d 481 (5th Cir. 1973), and *Des Bouillous* v. *Burke*, 418 F.2d 297 (1969). *Des Bouillous* expressly relied upon Wisconsin law to establish the "clearly convincing" burden of proof. See especially 418 F.2d at 300. Excluding *Des Bouillous*, *Roddy* and other Sixth Circuit opinions based upon *Roddy*, no case cited by the Sixth Cir-

cuit and no case cited for respondent has imposed upon the prosecution the "clear and convincing" burden of proof to establish the validity of prior convictions as a federal constitutional requirement.

Moreover, in this Court's opinion in *Sumner* v. *Mata*, 449 U.S. 539 at 551 (1981), the Court noted that the preponderance of the evidence standard is the usual standard regarding habeas corpus evidentiary matters. Also see *United States* v. *Lord*, 711 F.2d 887 at 891, n.3 (9th Cir. 1983), collecting cases and nothing that the preponderance standard usually applies regarding federal constitutional claims.

The Sixth Circuit opinion is in error in imposing a standard of clear and convincing evidence on the Commonwealth in habeas corpus proceedings and collateral attacks upon guilty pleas.

IV. The Defendant's Previous Experience in the Criminal Justice System Is Relevant In Determining the Voluntary and Intelligent Character of a Guilty Plea; the Sixth Circuit Erred By Ruling That Such Evidence Was Irrelevant.

In this case after the pretrial hearing on the validity of respondent's two previous guilty plea convictions introduced by the prosecution to establish the offense of being a persistent felony offender in the first degree, the sentencing judge expressly ruled against the respondent. (TE 60-61). The state court judge stated in part:

> On the basis of the record, the evidence and the totality of the circumstances shown at this hearing, the court finds that the defendant intelligently pled guilty in both of these prior instances, with full knowledge of the nature and consequences of a plea of guilty, and that the record is now complete to that extent, and

> therefore, the motion to dismiss those or to vacate those final sentences or not to utilize them in the present proceedings are overruled.

The Kentucky Court of Appeals reached the same conclusion after reviewing the record. (AP 32-33). The federal district judge after reviewing the record essentially agreed with the Kentucky Court of Appeals and the state trial court. (AP 24-25, HR 7). The Sixth Circuit rejected these rulings and ruled that a recidivist should be treated to the same "rights a first time offender possesses." (AP 17; 945 F.2d 137 at 142). The Commonwealth of Kentucky contends that the ruling of the Sixth Circuit is erroneous as a matter of law.

While the Commonwealth's petition for certiorari is pending in this case, a different panel af the Sixth Circuit upheld a somewhat similar ruling by the same federal district judge (Charles M. Allen), rejecting a motion to withdraw a guilty plea because of a violation of Federal Criminal Rule 11(c). *United States* v. *Evans,* 951 F.2d 729 at 730 and 732 (6th Cir. 1991). Sixth Circuit opinion stated in part, 951 F.2d at 732:

> While conceeding that he had not followed Rule 11(c) precisely in accepting the guilty plea, Judge Allen pointed out that Evans had recently been through a lengthy criminal trial in which he was found guilty, and had been sentenced by Judge Simpson. Therefore, Judge Allen concluded that Evans was aware of any constitutional rights that had not been specifically detailed at the plea session.

In *Fare* v. *Michael C.,* 442 U.S. 707, at 726 (1979), the Court in upholding the validity of a *Miranda* waiver and confession relied in part upon the juvenile defendant's previous experience with the criminal justice system. In

Marshall v. *Lonberger*, 459 U.S. 422 at 437 (1983) [reversing the Sixth Circuit], this Court cited Lonberger's previous experience in the criminal justice system as one of the factors in rejecting his claim of the invalidity of a previous guilty plea conviction. Also see *United States* v. *Henry*, 933 F.2d 553 at 560 (7th Cir. 1991), citing *Lonberger* for that proposition.

In *United States* v. *DeForest*, 946 F.2d 523 at 526 (7th Cir. 1991), the Seventh Circuit cited DeForest's previous experience in the criminal justice system as one of the factors to justify rejecting his challenge to a previous guilty plea offered for sentencing enhancement. In *Stano* v. *Dugger*, 921 F.2d 1125, at 1142-1143 (11th Cir. 1991) (en banc), the Eleventh Circuit rejected Stano's challenge to his guilty plea which resulted in a death sentence and cited as one of the factors to uphold the validity of the guilty plea that Stano had previous experience in the criminal justice system and had previously been convicted of first degree murder and sentenced to life imprisonment. In *LoConte* v. *Dugger*, 847 F.2d 745, at 751 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, the Eleventh Circuit concluded, "[A] guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing." Also see *United States* v. *Hafen*, 726 F.2d 21, at 25 (1st Cir. 1985), *cert. denied*, 466 U.S. 926, upholding a waiver of the right to counsel based in part upon defendant's previous experience in the criminal justice system. As noted in the Kentucky Court of Appeals opinion in this case, the Kentucky courts have also relied on defendant's previous experience in the criminal justice system in upholding guilty pleas (AP 30), *Lynch* v. *Commonwealth*, 610 S.W.2d 902 at 905 (Ky.App. 1980).

The Sixth Circuit erred as a matter of law in rejecting the conclusion of the state sentencing judge, the Kentucky Court of Appeals, the federal district judge, and authority from this Court that the defendant's previous experience in the criminal justice system was relevant in ascertaining the validity of a guilty plea.

V. The Kentucky Courts and Federal District Court Correctly Concluded That Respondent's 1981 Guilty Plea Conviction Was Valid.

The evidence in this case regarding the 1981 conviction was that appellant was represented by counsel, previously pleaded guilty and had executed a waiver of rights form in connection with the previous guilty plea, and that the 1981 guilty plea was sufficient to negotiate a minimum sentence. The 1981 guilty plea (Case No. 81-CR-0269) resulted in a sentence of five years for the offense of third degree burglary (Ky.Rev.Stat. 511.040) and second degree persistent felony offender (Ky.Rev.Stat. 532.080). (HR 6; JA 17-25). Five years would be the minimum sentence possible for a third degree burglary charge enhanced as a second degree persistent felony offender. [Class D felony (1 to 5 years) enhanced to Class C felony (5 to 10 years).] At one point during the testimony on the 1981 guilty plea respondent acknowledged that his attorney had informed him that he had been charged as a first degree persistent felony offender. (TE 17). Respondent also acknowledged that he did not have any witnesses to call to testify at trial regarding the burglary charge. (TE 38-39). Respondent also admitted that he had signed the Commonwealth's guilty plea negotiation form [JA 17-18] (TE 39). The essence of respondent's testimony regarding the 1980 guilty plea was simply that he did not remember whether or not he could

have been advised of his rights by the judge in connection with the guilty plea. (TE 42). In this respect respondent's testimony is similar to testimony rejected by the Seventh Circuit in cases arising under the Career Criminal Act, 18 U.S.C. §922(g)(1) and §924(e)(1). *United States* v. *Gallman*, 907 F.2d 639 at 643 (7th Cir. 1990); *United States* v. *Boyer*, 931 F.2d 1201 at 1205 (7th Cir. 1991). In *Clayton* v. *Blackburn*, 578 F.2d 117 at 119-120 (5th Cir. 1978), the Fifth Circuit upheld the guilty plea with an incomplete state court record in the face of similar testimony by the habeas petitioner that he could not remember whether he had been advised of his rights and such testimony was sufficient to establish a constitutional violation.

Appellant presented no evidence and no suggestion of any evidence that the advice the received from legal counsel was not within the constitutional standards required for effective assistance of counsel under the Sixth Amendment. See *Hill* v. *Lockhart*, 474 U.S. 52 at 56-57 (1985). Appellant failed to carry his burden or even attempt to carry his burden under that standard. The Sixth Circuit erred by rejecting the findings and conclusions of the state sentencing judge, the Kentucky Court of Appeals, and the federal district judge under the standards established by this Court in *Marshall* v. *Lonberger*, *supra*, and *Sumner* v. *Mata*, 449 U.S. 552 (1981). In *Winford* v. *Swenson*, 517 F.2d 1114 at 1118 (8th Cir. 1975), *cert. denied*, 423 U.S. 1023, the Eighth Circuit concluded:

> It is clear from the specific findings of the state court judge that Winford's plea was an effectively and accurately counseled plea made with full knowledge of the nature of the charge. These findings were entitled to a presumption of correctness with the burden on the habeas petitioner to establish that such factual deter-

> minations were erroneous. That burden was not met on the record in this case. . . . Invoking the language of *Townsend* v. *Sain*, 372 U.S. 293 (1963), Winford contends that Judge Wangelin erred in denying him a de novo evidentiary hearing since the state court had not expressly resolved all issues of fact, i.e., whether the plea was voluntary and understanding. . . . Nevertheless, *Townsend* expressly recognizes that federal courts sitting in habeas corpus may, in the absence of clear expression by the state court, reconstruct implied findings of fact and interpolate the constitutional criteria applied. [Citations, footnotes, and paragraph breaks omitted.]

Respondent's conviction and sentence as a first degree persistent felony offender under Kentucky law should be upheld by this Court because of the findings by the state court's and Federal District Court. The Sixth Circuit erred by ruling that all repeat offenders must be treated as first time offenders in reviewing the validity of their guilty pleas.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit rendered in this case should be reversed.

Respectfully submitted,

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